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No. 622

In the Supreme Court of the United States

OCTOBER TERM, 1941

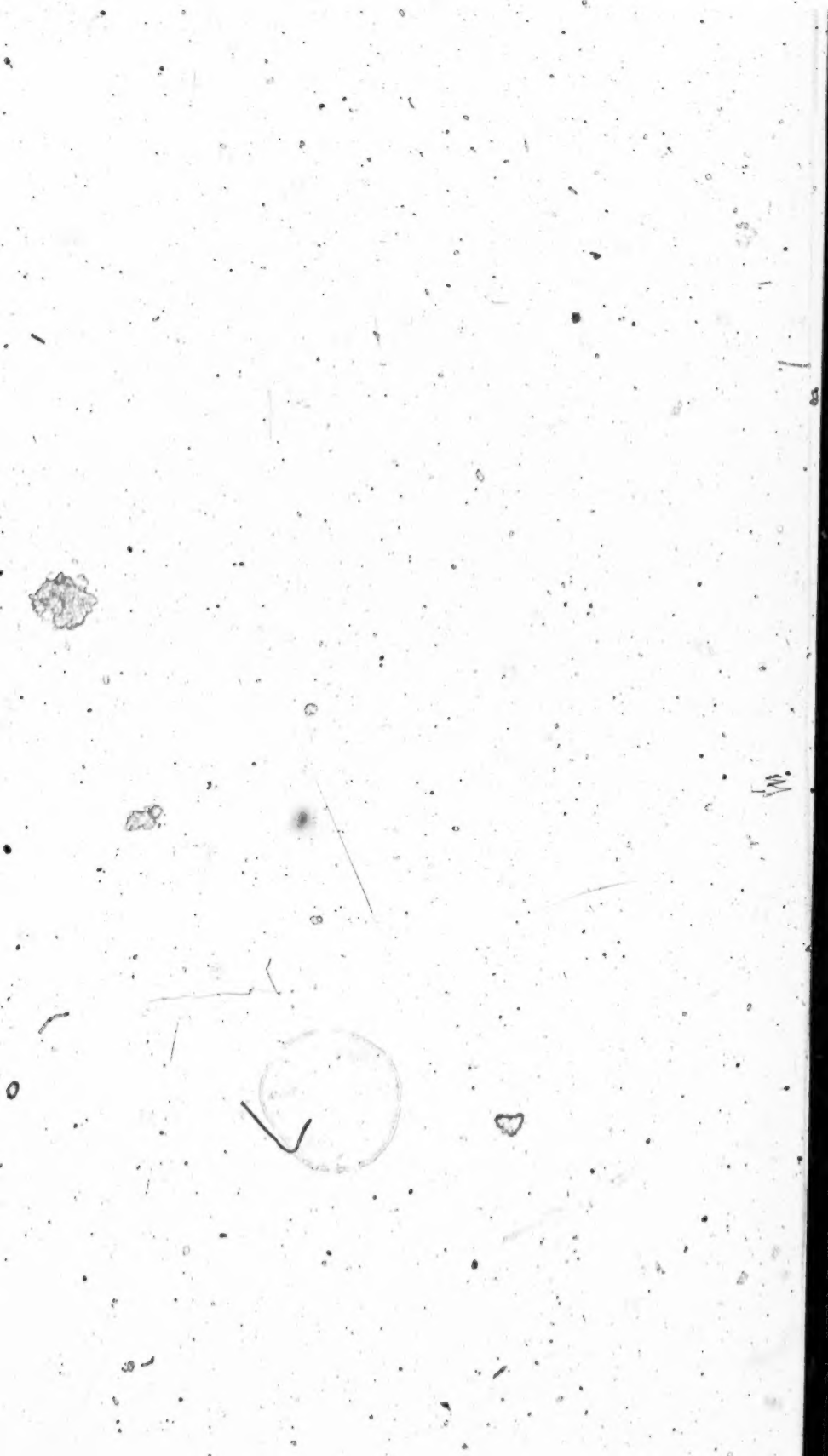
L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

A. H. BELO CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER



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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the district court (R. 185–189) is reported in 36 F. Supp. 907. The opinion and concurring opinion in the circuit court of appeals (R. 485–496) are reported in 121 F. (2d) 207.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 27, 1941 (R. 497). The petition

[1] L. Metcalfe Walling, the successor in office of Thomas W. Holland, was substituted for him on March 9, 1942, as the petitioner herein. Thomas W. Holland, in turn, was the successor in office of Philip B. Fleming, and was substituted for him on January 12, 1942.

for a writ of certiorari was filed on September 16, 1941, and granted on October 27, 1941 (R. 498). The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Prior to the enactment of the Fair Labor Standards Act the respondent paid its employees fixed weekly salaries. In anticipation of the Act, it made so-called agreements with each of its employees setting forth an hourly "basic rate of pay" (generally equal to one-sixtieth of the weekly salary), together with a guaranty that in any event the compensation would not be less than the prior weekly salary. The question is whether, in computing overtime compensation (at time and one-half), the arbitrary hourly rate specified in each employee's agreement is the "regular rate at which he is employed" under Section 7 of the Act.

STATUTE INVOLVED

Section 7 (a) of the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C., sec. 201 *et seq.*) provides as follows:

> SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than *one and one-half times the regular rate at which he is employed.* [Italics supplied.]

The other relevant provisions of the Act are printed in Appendix A, *infra,* pp. 42–47.

STATEMENT

On August 12, 1940, the Administrator filed his complaint (R. 1–5) in the District Court for the Northern District of Texas pursuant to Section 17 of the Fair Labor Standards Act. The complaint alleged that respondent had violated Sections 7 and 15 (a) (2) by employing certain of its employees subject to the Act for workweeks in excess of the applicable statutory maximum without payment of overtime compensation required by the statute (R. 3). The complaint also alleged that respondent, in violation of Section 15 (a) (1), since October 24, 1938, had continuously shipped in interstate commerce goods produced under substandard labor conditions. The complaint prayed a judgment enjoining respondent from violating Sections 15 (a) (1) and 15 (a) (2) of the Act (R. 4). In its answer (R. 7–22), respondent denied the viola-

tions and affirmatively alleged compliance. It also denied that the Act did, or constitutionally could, apply to its business, and claimed exemption from the Act as a "retail or service establishment" within the meaning of Section 13 (a) (2).[2]

The District Court, after hearing, found that respondent's employees were covered by the Act but that there had been no violation (R. 185–190) and entered judgment dismissing the complaint (R. 457). The Circuit Court of Appeals affirmed (R. 497).

Apart from facts relevant to the jurisdictional question,[3] the evidence disclosed the following: Prior to the effective date of the Act, October 24, 1938, respondent paid most of the 600 employees at its newspaper plant and radio station fixed weekly

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[2] Respondent attached to and made part of its answer a copy of its complaint in an action for a declaratory judgment filed by it against Street, the Regional Director of the Wage and Hour Division, and some of its employees. The action for a declaratory judgment was dismissed by the District Court and is not involved here.

[3] Respondent publishes at Dallas, Texas, the *Dallas Morning News*, a daily newspaper, and other periodicals, and operates radio station WFAA (R. 7–8). Both courts below rejected the contention of respondent (R. 11) that its employees were not engaged in interstate commerce or in the production of goods for interstate commerce (R. 189, 486). Respondent not only failed to raise the issue of coverage in its answer to the petition in this Court, but on the contrary urged this Court to dispose of the Section 7 issue. We therefore infer that respondent has abandoned any claim that it is not subject to the Act, and accordingly refrain from setting forth the jurisdictional facts.

salaries regardless of the number of hours worked (R. 9, 82–83). While there was no uniform schedule of hours, no one was authorized to work over 48 hours a week, except in emergencies, and women employees generally worked 44 hours a week (R. 63–64). No record was kept of the hours worked by these salaried employees (R. 54).[4] Immediately preceding the effective date of the Act, respondent requested its attorneys to formulate a plan whereby respondent could continue to work its employees the same number of hours per week and pay the same fixed weekly salary (R. 37–38, 85–86, 388). On advice of counsel, respondent on October 22, 1938, issued employment letters to about 400 employees, excluding those in the mechanical departments (R. 53–54). Each letter set forth what was termed "your basic rate of pay" per hour, and a guaranteed minimum weekly amount. The letters were in the following form (R. 467–468):

> JAMES S. ALDERMAN,
> *Station WFAA, Dallas, Texas.*
>
> DEAR SIR: The Fair Labor Standards Act which goes into effect on October 24, 1938, provides for the following minimum wages and maximum hours of employment:
>
> First year—25¢ per hour minimum, 44 hours maximum per week.

[4] However, records were kept of the hours of the linotypers, pressmen, and other employees of the so-called mechanical departments that operated under union contracts which set hourly and "shift" rates (R. 54–55).

Second year—30¢ per hour minimum, 42 hours maximum per week.

Third year—40¢ per hour minimum,[6] 40 hours maximum per week.

except that employees may work more than the number of hours specified above, provided that overtime rates shall be a minimum of one and one-half times the basic rate.

In order to conform our employment arrangements to the scheme of the Act without reducing the amount of money which you receive each week, we advise that from and after October 24, 1938, your basic rate of pay will be 67 cents per hour for the first forty-four hours each week, and that for time over forty-four hours each week you will receive for each hour of work not less than one and one-half times such basic rate above mentioned, with a guaranty on our part that you shall receive weekly, for regular time and for such overtime as the necessities of the business may demand, a sum not less than $40.00.

Very truly yours,

G. B. DEALEY, *President.*

Mr. G. B. DEALEY:

This will acknowledge receipt of your letter of October 22nd concerning wages and hours effective October 24, 1938.

(Signed) JAMES S. ALDERMAN.

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[6] The statutory minimum of 40 cents an hour does not become effective, pursuant to Section 6, until October 1945. This error was corrected in later letters (R. 51–53).

The record includes a stipulation (R. 466–474) setting out the relevant details of the letters issued to and signed by some forty employees. In these letters the weekly "guaranty" selected by the employer was the amount of the weekly salary obtaining prior to October 22, 1938 (R. 38–39, 86).[6] Almost without exception, respondent obtained the "basic" hourly rates set out in these letters by dividing the employee's weekly salary by 60 (R. 62, 88–89).[7] Additional letters were issued from time to time to new employees and to employees who received increases in pay[8] (R. 388, 466–474), the new "basic rates" likewise being one-sixtieth of the new guaranteed weekly salaries (R. 339–340).

Shortly after the effective date of the Act, respondent also instituted a time-keeping system for its salaried employees. Pay day was Tuesday for

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[6] Some raises in pay, apparently routine, were given. (See, for example, Pltf. ex. 2, R. 47, 194–309, at p. 207.)

[7] The exceptions occurred with respect to employees in the lower wage brackets, where division by 60 would have resulted in a "basic" rate lower than the then statutory minimum of 25 cents an hour. Thus, an employee named Bates was given a weekly "guaranty" of $14.50 and a "basic" rate of 25 cents an hour (R. 469).

[8] In a number of instances the new letters were signed some time after the employees actually received the raise. Anderson, for example, received a raise from $40 to $45 a week as early as September 11, 1939 (Pltf. ex. 2, R. 47, 195) but his new letter was not signed until October 24, 1939 (R. 472). Velma Boyce received a raise in pay as early as October 21, 1940 (Pltf. ex. 3, R. 47, 313) but did not get a new letter until January 31, 1941, four days before the trial of this case (R. 472).

the week ending the day before, and when an employee received his pay check he was required to hand in his time card showing the hours worked each day during the week just ended (R. 55–56, 129, 131, 338). Pay checks were prepared without reference to the hours worked; the pay-roll clerk began on Friday to prepare the checks to be distributed the following Tuesday (R. 144–145).

After October 24, 1938, as before, the number of hours worked by respondent's employees varied from week to week. The median figure continued to be about 48 hours for men and 44 for women. No change in working hours or in compensation was made on October 24, 1939, when the maximum hours stated in Section 7 of the Act decreased from 44 to 42 a week (R. 339–340), or so far as the record shows, on October 24, 1940, when the maximum became 40 hours (R. 127, 143, 148).

Despite the varying hours worked in excess of the statutory maxima after October 24, 1938, as before, the employees continued to receive, in the great majority of weeks, their weekly salaries or "guaranties," and no more.[9] Respondent's officials considered that the "employment letters" obviated any necessity of paying compensation in excess of the fixed weekly salaries, unless the employees worked hours in excess of 54½ a week during the first year of the Act; in excess of 54 the second year,

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[9] After October 24, 1938, just as before, respondent gave vacations with pay, sick leave, and Christmas bonuses (R. 78–79, 82), and paid for group life insurance (R. 180).

or in excess of 53⅓ hours thereafter (R. 89, 131–132).[10]

SPECIFICATION OF ERRORS

The court below erred:

1. In holding that the purpose of the overtime provisions was simply to establish and gradually raise minimum wages.

2. In holding that the "basic rates" specified in the contracts between the respondent and its employees were the "regular rates" at which the employees were employed within the meaning of the Fair Labor Standards Act of 1938.

3. In holding that nothing in the Act impairs the right of employer and employee to contract "as they have done here" for all-inclusive and regular weekly salaries regardless of variations in the hours worked each week.

4. In failing to hold that the regular rates at which respondent's employees were employed were

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[10] Since the "basic rate" was one-sixtieth of the stated salary, the salary was thought to permit a tolerance of 10½ hours during the first year, 12 the second year, and 13⅓ the third year, above the respective statutory maxima of 44, 42, and 40. Thus an employee "guaranteed" $18.00 per week had a "basic rate" of 30 cents per hour. During the first year his pay at straight time was considered to be $13.20 (44 hours x 30¢); the difference between that sum and $18.00 would cover 10½ hours at time and one-half (10½ x 45¢=$4.725). Similarly, in the second year straight pay of $12.60 (42 hours x 30¢) left 12 hours of "overtime" theoretically covered (12 x 45¢=$5.40); during the third year $12.00 was allocated to straight pay (40 hours x 30¢), leaving 13⅓ hours of overtime covered by the "guarantee" (13⅓ x 45¢=$6.00).

the rates of their actual compensation, and that they were entitled, for each hour of employment in excess of the statutory maxima, to additional compensation equal to one-half of the rates obtained for the particular week by dividing the amounts of their weekly salaries by the number of hours worked during the week.

5. In failing to find that the respondent had violated Sections 7 and 15 (a) (2) of the Act by employing its employees, who were engaged in interstate commerce or in the production of goods for such commerce, for workweeks longer than the maxima specified in Section 7 without compensating them for the excess hours at rates not less than one and one-half times the rates at which they were employed.

6. In failing to rule that the respondent had violated Section 15 (a) (1) of the Act by transporting, offering for transportation, shipping, delivering, and selling in interstate commerce goods in the production of which employees were employed in violation of Section 7 of the Act.

7. In failing to reverse the judgment of the district court.

SUMMARY OF ARGUMENT

I

A. Section 7 requires that overtime work be compensated "at a rate not less than one and one-half times the regular rate" at which the employee is employed. This can only mean 150

percent of the employee's actual rate of earnings during straight time. In the case of an employee receiving a fixed salary for a varying number of hours, the Administrator has consistently interpreted "regular rate" to mean the weekly wage divided by the number of hours actually worked during the particular week. His interpretation is entitled to great weight. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549. Every appellate court which has passed upon the question has upheld this construction of Section 7, and the court below has approved that construction in the absence of any agreement purporting to set the "regular rate" at a different figure. *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. (2d) 42 (C. C. A. 5th), pending on petition for certiorari, No. 887, present Term.

B. The only basis for the contention that the interpretation stated can be avoided if the parties set the "regular rate" by contract is the assumption that Section 7 seeks only to regulate wages and is not concerned with hours of employment. But the Act shows on its face that Section 7 was directed to maximum hours. The legislative history is exceedingly clear that Congress was concerned with hours as well as with wages and that the "time and a half" requirement of Section 7 was intended to discourage overtime work by requiring the employer to pay extra compensation therefor regardless of the magnitude of the employee's regular rate of compensation.

II

If Section 7 is to serve its function as a deterrent of overtime hours, the employer may not avoid paying extra compensation and thus nullify the Act's only sanction against overtime, by selecting an artificial figure and labelling it the "regular rate." The undisputed purpose of respondent's employment letters was to permit respondent to maintain unchanged its working and wage schedule despite the Act. The employees received the same compensation regardless of the number of hours worked, except when that number exceeded certain figures which were far in excess of the statutory maxima. For the overtime hours above those maxima, but below respondent's own maxima, respondent paid no additional compensation and the intended statutory incentive toward elimination of such hours was frustrated.

It is immaterial that respondent was free to enter into a legally binding contract with its employees in which the rate of compensation was described in terms of an unreal and artificial formula; the pivotal consideration is that that formula is not the "regular rate" within the meaning of Section 7 because it does not reflect the employee's actual hourly earnings. Nor is the *bona fides* of respondent's attempt to avoid the Act material. *Union Pacific R. R. Co.* v. *United States,* 313 U. S. 450, 462 Parties may not by agreement restrict the application of the

Act. *Chicago B. & Q. R. R. Co.* v. *Maguire,* 219 U. S. 549, 567–571. And the fact that Section 7 precluded the setting by contract of a "regular rate" different from the statutory "regular rate" raises no substantial constitutional question. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 391–395. To permit private arrangement to fix the scope of Section 7 would allow any who chose to make sport of the statute.

ARGUMENT

Respondent's employees after enactment of the Fair Labor Standards Act worked, almost without exception, the same hours for the same compensation as before its enactment, although their hours were substantially in excess of the statutory maxima. This was accomplished by treating the "basic rate" designated in the employment letters as the "regular rate" upon which overtime compensation is to be computed under Section 7. The court below did not hold that the "basic rate" stated in the letters reflected the actual rate of compensation, but held that respondent's plan was consistent with the Act on the following grounds: (a) The sole purpose of the Act, including the overtime provision of Section 7, is to raise substandard wages; hence it is satisfied by any arrangement between employer and employee for the payment of overtime so long as the compensation actually paid is equal at least to the statutory minimum compen-

sation for work up to the maximum hours and time and one-half that minimum for the remaining hours. (b) Respondent and its employees were, therefore, free to set the "regular rate at which he is employed," within the meaning of Section 7, at any figure (here, generally one-sixtieth of the weekly wage paid prior to the act) which would yield that result, without regard to the actual hourly earnings.

We shall show, first, that the consistent administrative interpretation of "regular rate" to mean the actual hourly rate of compensation is required by the statute and effectuates the primary purpose of Section 7 to discourage overtime employment; and, second, that respondent's employment letters cannot serve to change the "regular rate" into something other than the employee's actual hourly earnings.

I

THE "REGULAR RATE" WITHIN THE MEANING OF SECTION 7 (a) IS THE RATE AT WHICH THE EMPLOYEE IS ACTUALLY COMPENSATED DURING STRAIGHT TIME

A. THE MEANING OF "REGULAR RATE"

1. *The Text of the Statute.*—Section 7 (a) of the Act provides:

> No employer shall * * * employ any of his employees * * * for a workweek longer than forty-four [or 42 or 40] hours * * * unless such employee receives

> [overtime] compensation * * * at a rate not less than one and one-half times the regular rate at which he is employed.

The pivotal words, "one and one-half times the regular rate at which he is employed," can mean only a fifty percent increase of the employee's actual rate of earnings during straight time.[11] In the case of an employee hired at an hourly rate, the statutory requirement is indisputably clear: he must receive half as much again for his overtime hours.

Except for a rudimentary mathematical computation, the case is no different where an employee receives a fixed daily, weekly, or monthly salary. Since overtime, under Section 7, is expressed in hours per week, the required overtime compensation must speak in terms of a multiple of the regular *hourly* rate. Where the employee works a constant number of hours for a fixed salary, the answer is plain. The regular hourly rate is determined by dividing the fixed weekly[12] salary by the

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[11] The quoted phrase refers, of course, to the familiar "time and a half," a term generally understood to mean 150 percent of the compensation actually earned during straight time. In the debates on the bill the provision for overtime pay was termed "time and a half." 83 Cong. Rec. 9176 (Sen. Walsh), 83 Cong. Rec. 7404 (Rep. Boileau), 82 Cong. Rec. 1697 (Rep. Casey), 82 Cong. Rec. 1797 (Rep. Fitzgerald), 81 Cong. Rec. 7750 (Sen. Walsh), 81 Cong. Rec. 7780 (Sen. Austin), 81 Cong. Rec. 7792 (Sen. Bridges).

[12] Since Section 7 measures overtime in terms of hours per week, monthly wage rates must first be translated into weekly rates in order to compute the overtime rate.

constant number of hours, and the overtime compensation required is 150 percent of such rate.[13] The matter becomes debatable only in the case of an employee who works a fluctuating number of hours for a fixed salary. But even in this situation the answer is clear enough when it is recognized that the issue involves simply another application of the statutory requirement that one and one-half times the straight time compensation must be paid for the overtime hours.

Three methods of computation of the "regular rate at which he is employed" might theoretically be possible: (1) The weekly salary might be divided by the statutory maximum number of hours, giving a "regular rate" substantially in excess of the actual rate at which the employee is employed.[14] (2)

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[13] The courts have treated contracts providing a fixed salary in return for a definite number of hours as setting a specific and unvarying hourly rate. See *Bumpus* v. *Continental Baking Co.*, 124 F. (2d) 549, 553 (C. C. A. 6th), pending on petition for certiorari, No. 943, present Term; *Klotz* v. *Ippolito*, 40 F. Supp. 422 (S. D. Tex); *Reck* v. *Zarnocay*, 4 Wage Hour Rept. 305 (Sup. Ct. N. Y., N. Y. Co. 1941); *Emerson* v. *Mary Lincoln Candies*, 174 Misc. 353 (1940), affirmed, 261 App. Div. 879 (1941), affirmed, 287 N. Y. 33 (1941).

[14] This interpretation, which no court has accepted, would increase the required overtime payment, since the hourly rate would of necessity be higher; it might thus be thought to accomplish the congressional purpose to discourage overtime hours (*infra*, pp. 24–30) more surely than the other alternative methods. But Section 7 speaks of "the regular rate *at which he is employed*," and thus looks to the fact.

The "regular rate" might be determined by dividing the fixed salary by an average number of weekly hours worked during a base period of, say, six weeks, six months, or a year.[15] (3) The "regular rate" represents the weekly salary divided by the actual number of hours worked in that week. This third alternative does not require the departure from the actual rate of payment involved in the first alternative or the addition to the statutory language involved in the second alternative.

We submit that the third alternative is the correct one. It permits ready computation of overtime compensation required to be paid to an employee receiving a fixed salary for varying workweeks. Thus, if a $25 a week employee works 50 hours in a given week, with the present statutory maximum of 40 hours a week, there are 10 overtime hours. For each overtime hour he is entitled to

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not the ideal. If an employee works 50 hours for $25, his actual hourly rate is 50 cents, not 62.5 cents. Where the employee *regularly* works in excess of the maximum it is particularly clear that to determine his "regular rate" upon the basis of the maximum would yield a fictitious result. And since Section 7 imposes only a flexible limitation, there is no warrant for reading the statutory maximum as an implied condition of the employment contract.

[15] The Act, however, contains no hint of the period which would be used to determine the average number of hours worked. And Section 7 (a), in contrast to other sections (cf. secs. 3 (m), 6 (a) (5), 7 (b) (3), 7 (c), 8 (f), 11 (c), 13 (a) (1), 13 (a) (10), 14), does not direct the Administrator by regulation to particularize general statutory language.

receive one and one-half times as much compensation as he receives for each hour of straight time work. Since he was paid $25 for 50 hours of work, his "regular rate" for that week is 50 cents an hour. His compensation may therefore be computed as follows:

40 hours at 50 cents	$20.00
10 hours at 75 cents	7.50
Total	27.50

This method of computation can be applied uniformly regardless of the amount of the employee's compensation or the method or time of its payment, in strict analogy to the case of an employee who is hired and paid at a specified hourly rate. The hourly "regular rate" of the salaried employee will decrease in inverse ratio to the number of hours worked during the week, but this fluctuation from week to week as the number of hours varies in no way conflicts with any connotation of "regular" rate as used in Section 7. "Regular" is there used, not as equivalent to unchanging, but in contrast to special or unusual rates payable for overtime work; it means simply the normal, non-overtime, or straight-time, rate. See *Missel* v. *Overnight Motor Transp. Co.*, 5 Wage Hour Rept. 25 (C. C. A. 4th), pending on writ of certiorari, No. 939, present Term; *Graves* v. *Armstrong Creamery Co.*, 154 Kans. 365. Cf. *Wilson* v. *New*, 243 U. S. 332, 361–362. Section 7 is, indeed, simply an adaptation of a familiar legislative formula

through which overtime pay is phrased as a multiple of the "regular rate."[16]

2. *The Administrative Construction.*—Before the effective date of the Act, the Administrator of the Wage and Hour Division had already adopted the foregoing method of computation and advised employers that the "regular rate" was to be determined by dividing the number of hours worked during the particular workweek into the weekly wage. Interpretative Bulletin No. 4, issued October 21, 1938.[17] This interpretation has been consistently maintained through several revisions of the bulletin.[18] The Administrator has also promulgated, pursuant to Section 11 (a), regulations concerning the keeping of records. From the first

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[16] A number of illustrative State statutes and administrative orders requiring increased compensation for overtime work are collected in Appendix B, *infra*, pp. 48–50. Some of these statutes and orders speak of the straight time compensation as the "regular rate."

[17] The interpretative bulletins, unlike regulations pursuant to statutory authority (as in Sections 11 (c) and 13 (a) (1)) are not, and do not purport to be, binding. They avowedly do no more than express the Administrator's interpretation of the Act. See Administrative Procedure in Government Agencies, Part I, Administration of the Fair Labor Standards Act of 1938 (Monograph of the Attorney General's Committee on Administrative Procedure), S. Doc. No. 10, 77th Cong., 1st sess., pp. 71–72.

[18] The bulletin was re-issued, revised, or supplemented in November 1938, December 1939, July 1940, and November 1940.

issue, these regulations have reflected the construction adopted in Interpretative Bulletin No. 4.[19]

The consistent administrative interpretation represents the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." As such, it is entitled to great weight. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Missel* v. *Overnight Motor Transp. Co.*, 5 Wage Hour Rept. 25 (C. C. A. 4th); *Bumpus* v. *Continental Baking Co.*, 124 F. (2d) 549 (C. C. A. 6th).

3. *Subsequent Legislative History.*—The administrative construction is confirmed by subsequent proposals to amend the Fair Labor Standards Act.[20]

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[19] See Title 29, Chapter 5, Code of Federal Regulations, Part 516, 3 Fed. Reg. 2533, October 21, 1938, Amendments of February 16, 1938; March 11, 1939; April 25, 1939; September 23, 1939; October 13, 1939; November 9, 1939; February 20, 1940; June 1, 1940; June 10, 1940; August 1, 1940; November 22, 1940; March 18, 1941; March 20, 1941. No changes were made with respect to this interpretation. On September 15, 1941, regulations were made effective repealing and superseding all previous regulations, 6 Fed. Reg. 4694. These regulations, which are now in effect, refer specifically to Interpretative Bulletin No. 4 in connection with the method of reporting the regular rates of salaried employees working a fluctuating workweek.

[20] See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 487-489.

A few bills have been introduced to exempt salaried employees receiving above the minimum wage but have not been acted upon.[21] A less drastic bill was reported favorably by the House Committee on Labor; its report leaves no doubt as to the intended scope of the Act. It said (H. Rept. No. 522, 76th Cong., 1st sess., pp. 8–9):

> While the committee was of the opinion that the hour provisions of the act are as necessary and as beneficial to the ordinary clerical workers as to almost any other class of employees subject to the act, it is also believed that they should not include those employees whose work generally requires flexibility in working time and whose salaries are comparatively high. A guaranteed monthly salary of $200 was believed to be a satisfactory basis of exemption from the act. A lower figure than $200 would undoubtedly exempt a considerable number of salaried workers to whom the overtime benefits of the act should extend.

4. *The Decisions.*—This interpretation of "regular rate" has been accepted in the great ma-

[21] See also H. R. 4363, 76th Cong., 1st sess., Feb. 21, 1939, a bill by Congressman Cox to exempt clerical employees employed on a straight-salary basis; H. R. 4645, 76th Cong., 1st sess., Mar. 1, 1939, a bill by Congressman Thomas, of Texas, to exempt clerical employees, writers, and reporters receiving more than $1,200 a year; 86 Cong. Rec. 5455, May 2, 1940, an amendment by Congressman Harrington to exempt monthly salaried employees who receive more than the minimum wage established by Section 6.

jority of cases arising under the Act. The view that the "regular rate" of an employee is the rate at which he is actually compensated has been applied whether the employment is on a salary, by the hour, or at piece work.[22] In the case of employees not employed on an hourly basis, some 15 courts have computed the regular rate by dividing the wages received by the hours worked to earn such wages.[23] Only a minority of five lower court

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[22] *Bumpus* v. *Continental Baking Co.* 124 F. (2d) 549 (C. C. A. 6th); *Fleming* v. *Carleton Screw Products Co.*, 37 F. Supp. 754 (Minn.); *Fleming* v. *Pearson Hardwood Flooring Co.*, 39 F. Supp. 300 (E. D. Tenn.); *St. John* v. *Brown*, 38 F. Supp. 385 (N. D. Tex.); *Drake* v. *Hirsch*, 40 F. Supp. 290 (N. D. Ga.); *Sunshine Mining Co.* v. *Carver*, 41 F. Supp. 60 (Idaho); *Thornberg* v. *Eastern T. & W. N. C. Motor Transp. Co.*, 3 Wage Hour Rept. 534 (Sup. Ct. Tenn. 1940); *Boylan* v. *Liden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich., 1941); *Murray* v. *Noblesville Milling Co.*, 5 Wage Hour Rept. 55 (S. D. Ind. 1942).

[23] *Missel* v. *Overnight Motor Transportation Co.*, 5 Wage Hour Rept. 25 (C. C. A. 4th); *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275, 282 (E. D. N. Y.); *Abadie* v. *Cudahy Packing Co. of Louisiana*, 37 F. Supp. 164 (E. D. La.); *Moss* v. *Postal Telegraph-Cable Co.*, 4 Wage Hour Rept. 291 (M. D. Ga. 1941); *Graves* v. *Armstrong Creamery Co.*, 154 Kans. 365 (1941); *Williams* v. *General Mills*, 39 F. Supp. 849 (N. D. Ohio); *Haddad* v. *Beckerman Shoe Corp.*, 4 Wage Hour Rept. 329 (C. C. Pa. 1941); *St. John* v. *Brown*, 38 F. Supp. 385 (N. D. Tex.); *Angel* v. *Dayton Veneer & Lumber Mills*, 4 Wage Hour Rept. 471 (M. D. Ga. 1941); *Wagner* v. *Estate of Abe Field*, 4 Wage Hour Rept. 329 (Super. Ct. Ind. 1941); *McMillan* v. *Wilson & Co.*, decided February 27, 1942 (Sup. C . Minn.); *Hargrave* v. *Mid-Continent Petroleum Corp.*, 36 F. Supp. 233 (E. D. Okla.); *McLendon* v. *Bewley Mills*, 4 Wage Hour Rept. 30 (N. D. Tex. 1940); *Klotz* v. *Ippolito*, 40 F. Supp. 422 (S. D. Tex.);

decisions are to the contrary.[24] These cases, like the decision of the court below in the instant case, proceed on the erroneous assumption (*infra*, pp. 24–30) that the Act merely regulates minimum wages and has nothing to do with hours.

The court below has held, subsequent to the decision under review, that "if there is no agreement fixing the amount to be paid for regular and overtime work, the regular rate * * * may properly be determined by dividing the total pay each week by the total hours worked." *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. (2d) 42, 44.[25]

Reck v. *Zarnocay*, 4 Wage Hour Rept. 305 (1941); *Allen* v. *Moe*, 5 Wage Hour Rept. 106 (D. Idaho, 1942); *Emerson* v. *Mary Lincoln Candies*, 174 Misc. 353 (1940), affirmed 261 App. Div. 879 (1941), affirmed 287 N. Y. 33 (1941).

[24] *Gurtov* v. *Volk*, 170 Misc. 322 (Munic. Ct. N. Y. 1939); *Reeves* v. *Howard County Refining Co.*, 33 F. Supp. 90 (N. D. Tex.); *Fleming* v. *Stone*, 41 F. Supp. 1000 (N. D. Ill.); *Keegan* v. *Ruppert*, 4 Wage Hour Rept. 712 (S. D. N. Y. 1941); *Schlee* v. *Lincoln Oil Co.*, 5 Wage Hour Rept. 72 (C. C. Mich., 1941). In the *Reeves* case, the court adopted the "minimum wage" theory, but two employees who were compensated at rates above the minimum recovered overtime compensation. The *Stone*, *Keegan* and *Schlee* cases were decided primarily on the authority of the decision of the Circuit Court of Appeals in the case at bar.

[25] In its opinion in the case at bar, the Circuit Court of Appeals stated that "In cases where there is no express agreement as to the regular rate at which the employee is employed, but only an agreement for a weekly wage, appellant's [the Administrator's] method of arriving at the regular rate * * * would, we think, be unexceptionable" (R. 489). In view, however, of the court's emphatic assertion that the purpose of the Act was solely to regulate

In result, every appellate court, and every trial court save five, which has considered the question (see *supra*, pp. 22–23), has sanctioned the administrative construction of Section 7.

5. *The War Emergency.*—Respondent joined in urging that a writ of certiorari issue here, asserting that to interpret the Act as intended to discourage hours of labor in excess of the statutory maxima "is square in the face of the needs of national defense" (Memo., pp. 5, 7). But it is submitted that this Court is an inappropriate forum in which to debate the merits of a congressional policy which has been so clearly expressed (see *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 394; *Nebbia* v. *New York*, 291 U. S. 502, 537), and which, if change were contemplated would no doubt be the subject of careful legislative study.[26]

B. THE ADMINISTRATOR'S INTERPRETATION OF "REGULAR RATE" EFFECTUATES THE POLICY OF THE ACT TO DISCOURAGE OVERTIME EMPLOYMENT

The court below, while it regarded the Administrator's interpretation of Section 7 as otherwise "unexceptionable," held that since the Act was confined in purpose to the regulation of wages its objective would not be frustrated by permitting

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wages, the significance of the quoted sentence was not apparent until clarified by the decision in the *Warren-Bradshaw* case.

[26] See, for example, General Order No. 13 of the Chief of Ordnance November 15, 1917, reproduced in Annual Report of the Administrator, Wage and Hour Division, 1940, Chap. 1; pp. 23–24.

the "regular rate" to be set, by contract, at a different figure than is yielded through the Administrator's method of computation (*supra*, pp. 13–14). In *Overnight Motor Transportation Co., Inc.* v. *Missel*, No. 939, to be argued immediately following the instant case, the petitioner urges the same limited construction of the Congressional purpose and, on the basis of that construction, contends that the overtime compensation provisions of Section 7 do not apply at all where the employee's total weekly compensation equals at least the statutory minimum for straight time and time and one-half that minimum for the remaining hours, or, in the alternative, that Section 7 be read to require only time and a half the minimum rate prescribed in Section 6.

By requiring overtime compensation at 150 per cent of the regular rate, Congress plainly intended to discourage hours of work in excess of the stated maxima for all employees, other than those specifically excepted, whether their regular compensation be munificent or only at the statutory minimum. This intent is clear both on the face of the Act and from its legislative history.

1. Section 7 (*supra*, pp. 14–15) is entitled "Maximum Hours." As its title plainly shows, it is directed to maximum hours and not to minimum wages. It does not declare that the minimum wage for overtime hours shall be one and one-half times the minimum rate for straight time; rather, it requires overtime compensa-

tion at the rate of one and one-half times the regular rate, regardless of its magnitude. Such additional compensatio. at 150% of the regular rate was intended as a sanction to enforce the statutory prohibition of employment beyond the maximum number of hours. Although the relative mildness of the sanction shows that the statute was designed to discourage rather than to eliminate overtime, it nonetheless remains a plain direction that "no employer shall * * * employ any of his employees * * * for a workweek longer than" the prescribed number of hours.[27]

Moreover, the provisions which exempt certain classes of employees from the operation of Section 7 (a) demonstrate that that section is primarily concerned with hours of employment. The hours of labor of those exempted are either subject to other regulation,[28] are difficult to standardize,[29] or

[27] Section 18, dealing with the relation of the Act to other laws, refers to "the maximum workweek established under this Act." Section 11 (a), relating to investigations, and section 11 (c), relating to records, both refer to "wages, hours, and other conditions and practices of employment."

[28] Section 13 (b) (1) exempts employees with respect to whom the Interstate Commerce Commission has power to established maximum hours. Section 13 (b) (2) exempts railroad employees, whose hours are regulated under collective bargaining agreements of long standing and the Hours of Service Act (34 Stat. 1415, 45 U. S. C. 61). Section 7 (b) allows a limited exemption for employees who are employed under collective bargaining agreements which limit the hours of employment.

[29] Section 13 (a) (1) exempts executive and professional employees and outside salesmen.

reflect an economic basis for hours of work in excess of the maxima for limited periods.[20] Thus, Section 7 (a) and the related sections form a consistent and comprehensive pattern of hours regulation wholly without reference to the minimum wage provisions of the Act.

The only reasonable conclusion from the language of the statute is that Congress intended to regulate hours of labor, as well as minimum wages. To that end, it prohibited employment beyond a specified maximum workweek unless the prescribed compensation was paid for overtime.

The legislative history strongly buttresses this conclusion. The two practically identical bills introduced in each house pursuant to the President's recommendation that Congress "define a general maximum working week,"[21] provided for a board that might prohibit altogether a workweek longer than the statutory maximum or might permit overtime on condition that the employee receive "additional compensation" at the rate of time and a half his "regular hourly wage rate."[22] In report-

[20] Section 7 (b) follows a limited exemption for employees in seasonal industries. Section 7 (c) exempts employees engaged in work on perishable commodities.

[21] Message to Congress, May 24, 1937, 81 Cong. Rec. 4961. The message noted that longer hours might be permitted "on the payment of time and a half for overtime."

[22] S. 2475, referred to the Committee on Education and Labor of the Senate, 81 Cong. Rec. 4954 (1937); and H. R. 7200, referred to the Committee on Labor of the House of Representatives, 81 Cong. Rec. 4998 (1937), each in the 75th Congress. While the bill passed by the Senate contained

ing the Senate bill the Committee on Education and Labor said:[33]

> The committee believes that a start should be made at the present session of the Congress to protect this Nation from the evils and dangers resulting * * * from long hours of work injurious to health. This law proposes to accomplish this purpose * * *. * * * it is the objective of the act to attain a maximum workweek of not more than 40 hours as rapidly as practicable without curtailing earning power or reducing production, and the attainment of a shorter workweek by collective bargaining or otherwise is to be encouraged.

The House Committee on Labor, in reporting on the same bill, repeated *verbatim* this "objective of the act" and added that flexibility had been introduced into the "regulation of hours" by authorizing employment in excess of the applicable maximum upon condition of payment of one and one-half times the regular rate.[34] The conference report on the bill in its final form was agreed to unanimously

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substantially the original provisions as to hours regulation (81 Cong. Rec. 7957 (1937); 83 Cong. Rec. 9246 (1938)), the House amended the bill so as to eliminate the board's power to set an inflexible maximum workweek, but retaining the prohibition of overtime unless the employer paid "at the rate of one and one-half times the regular hourly rate" (83 Cong. Rec. 7450).

[33] S. Rept. 884 on S. 2475, 75th Cong., 1st sess., July 6, 1937, pp. 4, 7.

[34] H. Rept. 1452, 75th Cong., 1st sess., August 6, 1937, pp. 14–15.

by the managers on the part of the Senate and of the House. Under the heading "Maximum Hours" the report[35] states:

> Section 7 of the conference agreement provides for the establishment of maximum hours of employment * * *. The conference agreement contains in section 7 (a) the definite maximum hours of employment * * * with overtime work permissible upon the payment of one and one-half times the regular wage rate.[36]

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[35] 83 Cong. Rec. 9249, 9254 (1938).

[36] In the debates it was repeatedly declared that the purpose of section 7 (a) was to reduce hours of labor. 83 Cong. Rec. 9177 (Sen. Walsh), 83 Cong. Rec. 9252, 9254, 9258 (Rep. Randolph), 7311 (Rep. Sirovich), 7315 (Rep. Mott), 7325 (Rep. Wolverton), 7428 (Rep. Connery), 82 Cong. Rec. 1415 (Rep. Curley), 1470 (Rep. Jenks), 1477 (Rep. Rutherford), 1480 (Rep. Dorsey), 1676 (Rep. Shafer), 81 Cong. Rec. 7651 (Sen. Walsh), 7779 (Sen. Austin), 7791 (Sen. Bridges), 7802 (Sen. Maloney); 82 Cong. Rec. 1391 (Rep. Norton); 81 Cong. Rec. 7650 (Sen. Walsh). A spread of employment was expected to result from the shortened workweek. 83 Cong. Rec. 9176 (Sen. Walsh), 82 Cong. Rec. 1696 (Rep. Norton), 83 Cong. Rec. 9263, 7314 (Rep. Dunn), 7323 (Rep. DeMuth), 7325 (Rep. Wolverton), 7278 (Rep. O'Connor), 7428 (Rep. Connery), 7428 (Rep. Patrick), 82 Cong. Rec. 1415 (Rep. Curley), 1479 (Rep. Jenks), 82 Cong. Rec. 1477 (Rep. Rutherford), 82 Cong. Rec. 1478 (Rep. Dorsey), 82 Cong. Rec. 1486 (Rep. Wood), 82 Cong. Rec. 1490 (Rep. Teignan), 82 Cong. Rec. 1672–1672 (Rep. Ellenbogen), 82 Cong. Rec. 1672 (Rep. Shafer), 81 Cong. Rec. 7746 (Sen. Black), 81 Cong. Rec. 7807 (Sen. Maloney), 81 Cong. Rec. 7848 (Rep. Healey), 81 Cong. Rec. 7941 (Sen. Barkley). See also 83 Cong. Rec. 7314 (Rep. Dunn), 82 Cong. Rec. 1470 (Rep. Jenks), 82 Cong. Rec.

This Court has recognized that hours, as well as wages, are included within the substandard "labor conditions" at which the Act is aimed. *United States* v. *Darby*, 312 U. S. 100, 109–110. The Court summarized the provisions of Section 7 by saying (p. 110): "the maximum hours of employment for employees 'engaged in commerce or the production of goods for commerce' without increased compensation for overtime, shall be forty-four hours a week." While the Court stated (p. 125) that both sections 6 and 7 "are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime," Section 7 was upheld, not as a regulation of minimum wages as such, but as a regulation of hours, and the validity of Section 7 under the Fifth Amendment was sustained on the authority of cases dealing with maximum hour statutes (p. 125). A large majority of the lower Federal courts and State courts have likewise held that Section 7 is designed as a flexible regulation of hours and not as a minimum wage provision.[37]

1487 (Rep. Mott), 82 Cong. Rec. 1601 (Rep. Phillips), 81 Cong. Rec. 7803 (Sen. Maloney). The provision for overtime compensation was termed a "penalty" on overtime work, which would tend to reduce it. 82 Cong. Rec. 1600 (Rep. Coffee), 81 Cong. Rec. 7655, 7809 (Sen. Walsh), 82 Cong. Rec. 1697 (Rep. Smith).

[37] *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56 (C. C. A. 8th); *Bowie* v. *Gonzalez*, 117 F. (2d) 11, 16 (C. C. A. 1st); *Bumpus* v. *Continental Baking Co.*, 124 F.

II

RESPONDENT'S EMPLOYMENT LETTERS MAY NOT SERVE TO CHANGE THE EMPLOYEE'S "REGULAR RATE"

We have shown that "regular rate" in Section 7 means the employee's actual rate of earnings during straight time and that the prescribed fifty percent increase in the rate of actual compensation was intended by Congress to discourage overtime. If Section 7 is to serve this function, the employer plainly may not avoid paying extra compensation and thus nullify the Act's only sanction against overtime, merely by selecting an artificial figure, wholly unrelated to actual wages, and labeling it the "regular rate."

That is precisely what respondent did here; it asks the Court to sanction a "technically elegant arrangement" (*Griffiths v. Commissioner*, 308

(2d) 549 (C. C. A. 6th); *Missel* v. *Overnight Motor Transp. Co.*, 5 Wage Hour Rept. 25 (C. C. A. 4th); *Fleming* v. *Carleton Screw Products Co.*, 37 F. Supp. 754, 758 (Minn.); *St. John* v. *Brown*, 38 F. Supp. 385, 390 (N. D. Tex.); *Williams* v. *General Mills*, 39 F. Supp. 849 (N. D. Ohio); *Sunshine Mining Co.* v. *Carver*, 41 F. Supp. 60, 67 (Idaho); *DuBois Soap Co.* v. *Floyd*, 38 N. E. (2d) 919 (C. A. Ohio 1941); *Butte Miners' Union No. 1* v. *Anaconda Copper Min. Co.*, 118 P. (2d) 148, 152 (Mont. 1941); *Abroe* v. *Lindsay Bros. Co.*, 300 N. W. 457, 458 (Sup. Ct. Minn. 1941); *McMillan* v. *Wilson & Co., Inc.*, decided February 27, 1942 (Sup. Ct. Minn.); *Fleming* v. *Knox*, 5 Wage Hour Rept. 38 (S. D. Ga. 1941). Five cases, apart from the decision below, have held that Section 7 was designed to establish a minimum wage for overtime instead of working to discourage overtime generally. They are cited *supra*, footnote 24, p. 23.

U. S. 355, 357) plainly intended to avoid the "time and a half" requirement. In fixing a "basic rate" at one-sixtieth the weekly salary together with a guaranty of the latter, the employment letters were quite evidently designed to permit respondent to maintain unchanged its working and wage schedule despite the Act. In transmitting the letters embodying the plan to a supervisor at the radio station, respondent's paymaster on October 22, 1938, sent a note which stated: "It is to be impressed on the signers that they sign willingly, that there is no change in their hours and pay. It is merely aligning us all with the requirements of the Wages and Hours Act that is effective Sunday night, at midnight, October 24, 1938" (R. 388). Similarly, in a memorandum "To all Department Heads" dated October 19, 1939, explaining the plan, the chairman of the board stated that since there were "only a few office boys and clerks in minor capacity that earn less than the required minimum, *the change will have very little effect on our operation*" (R. 339).

The record discloses the accuracy of this prediction. By using 60 as a divisor to obtain the "basic rate," respondent in effect set up its own scale of maximum hours at so high a level, in relation to ordinary operations, that it almost entirely avoided the payment to the employees of any more than their fixed weekly salaries (R. 89, 131–132,

390). Compare note 10, p. 9, *supra*. The result, of course, was that the overtime hours between the statutory maxima and respondents' maxima cost respondent nothing additional and the intended statutory incentive toward elimination of such hours was completely thwarted.

The evidence shows in detail this frustration of the Congressional policy. Transcriptions of respondent's pay roll and time records for 48 employees were introduced in evidence (R. 194–309, 310–337). These transcriptions covered over 1,100 workweeks, between October 24, 1938, and the end of 1940. In over 800 of these 1,100 weeks, hours in excess of the statutory maxima were worked. Yet in only about 30 of these workweeks did employees receive any compensation in addition to their fixed salaries, and then only when they worked more than 54½, 54, or 53 hours a week (R. 273, 276, 314–315, 319, 326–327, 328, 332, 334, 336–337).[38]

Neither respondent's "basic rates" (one-sixtieth of the salaries) nor the number of hours worked had any effect upon the amount of compensation received, except in those rare weeks longer than respondent's own maxima. (a) As applied by respondent, the same "basic rate" for the same hours gave different weekly wages to different em-

[38] In practically as many weeks no additional compensation was paid even for hours in excess of respondent's maxima (R. 214, 231–232, 250, 273, 289, 321–323, 327).

ployees.[39] (b) Employees received increases in the "basic rates" and continued to receive exactly the same weekly pay as before.[40] (c) In other cases, corresponding increases in the "basic rates" produced wholly different results in the weekly pay.[41] (d) In other instances the weekly wage was increased while the hourly "basic rate" and the

[39] See the following table:

	Basic hourly rate	Hours worked	Guaranteed weekly wage
	Cents		
Byron Bates (R. 202, 472)	30	48	$16.50
	30	48	16.00
Joe A. Greeley (R. 240-242, 472)	30	48	16.50
Robert Montigue (R. 273-276, 469, 473)	30	45-48	15.00
	30	45-48	15.60
Harrill Eastus (R. 227-231, 472)	30	45	18.00
Miss Audrey Batts (R. 205-208, 472)	30	44	18.00

[40] Burleson's contract of October 22, 1938, called for a "basic rate" of 25 cents an hour with a guaranteed weekly wage of $15.00. In October 1939, a new contract was executed raising the "basic rate" to 30 cents, but his weekly pay remained $15.00 and he continued to work approximately the same hours (R. 214–215, 469, 472). Likewise, Greeley's contract of October 22, 1938, had a "basic rate" of 27 cents an hour with a guaranteed weekly wage of $16.00. His October 24, 1938, contract stated a "basic rate" of 30 cents an hour, but his weekly wage remained the same and he continued to work exactly the same hours (R. 240–241, 469, 472).

[41] An increase of 4 cents an hour in Miss Vickers' "basic rate" coincided with an increase of her weekly wage from $25.00 to $27.50 (R. 295–298, 470, 473), although increases of 5 and 3 cents in the hourly "basic rates" of Burleson and Greeley affected their weekly wage not at all, and although she worked fewer hours than they. (Note 40, *supra*.)

hours worked remained the same.[42] (e) Employees worked varying numbers of hours, including varying amounts of statutory overtime, yet received the same pay each week.[43] (f) Finally, when the statutory number of hours changed, an employee could nevertheless receive the same pay for the same hours.[44]

Except in rare instances where respondent paid extra for hours in excess of 54½ (or 54 or 53), it made no use of the "basic rates" in calculating the employees' pay. The "basic" rates appear in the "employment letters," but they appear nowhere else on respondent's records. The only possible conclusion is that the rates at which respondent's employees were actually employed—the rates which actually determined the amounts of their

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[42] Bates' guaranteed weekly wage was increased from $15.30 to $16.50, but his "basic rate" per hour remained 30 cents and his weekly hours continued to be 48 (R. 202–204, 472). Newnam's guaranteed weekly wage was increased from $16.00 to $18.00, but his "basic rate" stayed at 30 cents an hour, and his hours averaged about the same, decreasing if anything (R. 281–284, 473).

[43] West worked weeks of 46, 32, and 48 hours for $35.00 a week (R. 299–302). Brown worked weeks of 46¾, 34¼, 51¾, 48¼, and 50 hours, all for a weekly $45.00 (R. 314–315).

[44] Miss Batts worked 44 hours for $18.00 in every week shown, although during the first year of the Act with a statutory maximum of 44 hours, her week included no overtime, while during the second year it included 2 overtime hours and during the third year 4 hours (R. 205–208).

compensation—were the weekly rates in the amounts of their respective salaries. Whatever the "basic rates" may have been,[45] they were not the "regular rates" of pay of respondent's employees.

In urging that the employment letters could not serve to exempt respondent from the statutory command and that the employees' overtime compensation must be computed on their actual rates

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[45] Respondent argued in its brief below (pp. 31–32, 37, 47, 60–61) that all compensation in excess of the basic rates was overtime. But under respondent's "allocation" of the weekly salary between regular time and overtime compensation (note 10, p. 9, *supra*), the "overtime" hourly rates would vary fantastically. An employee with a guaranteed weekly salary of $30.00 would have a "basic rate" of 50 cents an hour. With a statutory maximum of 40 hours a week, if he worked 50 hours, $20.00 of the salary would be allocated to "regular time" (40×50), and $10.00 to the 10 hours overtime, so that his overtime rate would be twice his "basic rate." If he worked only 42 hours, his "regular time" compensation would remain at $20.00 and his overtime compensation for 2 hours at $10.00, so that his overtime rate would be $5.00 an hour, or 10 times his "basic rate." And if he worked but 40 hours, he would receive overtime compensation of $10.00—one-half of his straight time wages—for working no overtime at all.

During the trial, respondent attempted to explain the variable difference between the guaranteed weekly wage actually paid, and what the compensation would have been if computed on the "basic rates," by characterizing that difference as a "bonus" (cf. R. 15, 31, 87). But since respondent was under contractual obligation to pay that amount, it was an integral part of the normal earned compensation, and not a bonus either in the sense of a gratuity (*Bogardus* v. *Commissioner*, 302 U. S. 34, 44) or as some special payment for services (*Kenicott* v. *The Supervisors*, 16 Wall. 452, 471).

of pay, as it would be were the letters absent, we do not contend that respondent was not free to enter into new contracts of employment. Our contention is that the artificial "basic rates" fixed in these letters, when considered in conjunction with the weekly guaranty, were obviously not the "regular rates" within the meaning of Section 7 (a), as the court below held them to be.[16] We do not question that all rates of pay have their ultimate basis in the agreement of employer and employee or that the Act permits a genuine reduction in wages.[17] Our position is simply that the "regular rate" within the meaning of the statute is the actual rate of compensation under the contract rather than the artificial figure which the contract may describe as the rate.

Respondent relies heavily upon the District Court's finding (R. 187–189), approved by the Circuit Court of Appeals (R. 486, 488, 495), that

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[16] The district court purported to find as a fact "that the regular wage upon which overtime or time and a half has been figured in each instance is the regular wage that the employer and employee had contracted for, and that such regular wage is in excess of the legal minimum wage" (R. 189.) This "finding of fact" does not rest upon the court's appraisal of conflicting evidence, but upon the court's conception of "regular rate" and is actually a ruling of law that the "regular rate" is the "agreed" or "contract" rate. *Meade* v. *United States*, 9 Wall. 691; *The Britannia*, 153 U. S. 130, 141; *Truax* v. *Corrigan*, 257 U. S. 312, 325.

[17] Section 18, *infra*, declares that nothing in the Act shall justify a wage reduction but does not undertake to forbid a reduction to any level above the minimum.

the contracts were *bona fide*. Nothing we have said implies the contrary. There is no indication that the contracts were procured by fraud or duress or that their purpose to avoid the requirements of the Act showed a dishonest intent. But if we are correct in maintaining that "regular rate" in Section 7 means the employee's actual hourly compensation, the parties' "*bona fides*" in contracting that it shall mean something else as applied to them is immaterial; the Act is concerned not with their state of mind but with the fact of their actions. *Union Pacific R. R. Co.* v. *United States*, 313 U. S. 450, 462. That fact is that, as to any employee who worked less than respondent's "maxima" of 54.5, 54, or 53.3 hours per week, the weekly salary guaranty inevitably set the actual hourly rate of earnings, and therefore the "regular rate," at something higher than the arbitrary "basic rate" specified in the employment letters. No agreement that the regular rate is different from what it is in fact can affect the operation of the Act.

Respondent surely cannot successfully contend that statutes should be so construed that compliance with them may become a matter of private choice, *New York, New Haven and Hartford R. R. Co.* v. *Interstate Com. Comm.*, 200 U. S. 361, 392, or that the parties may by agreement restrict their application. *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549, 567–571; *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, 307. Like other

remedial statutes in the public interest (see *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364), wage-hour statutes are not to be waived or avoided by private agreement. *United States* v. *Morley Const. Co.*, 98 F. (2d) 781, 788 (C. C. A. 2d), certiorari denied, *sub nom. Maryland Casualty Co.* v. *United States*, 305 U. S. 651; *Larsen* v. *Rice*, 100 Wash. 642 (1918); *Montgomery Ward & Co.* v. *Lusk*, 52 S. W. (2d) 1110 (Tex. 1932). That regulatory statutes like Section 7 affect freedom of contract raises no substantial constitutional question. See *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 391–395; *Olsen* v. *Nebraska*, 313 U. S. 236.

These settled principles apply with full force to the Fair Labor Standards Act. *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622 (C. C. A. 7th); *Fleming* v. *Carleton Screw Products Co.*, 37 F. Supp. 754 (Minn.), appeal pending; *McLendon* v. *Bewley Mills*, 4 Wage Hour Rept. 30 (N. D. Tex. 1940); *Murray* v. *Noblesville Milling Co.*, 5 Wage Hour Rept. 55 (S. D. Ind. 1942); cf. *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.). Otherwise the statutory command would reach only to those who, from nobility or from naïveté, failed to notify their employees that their "agreed rate" of pay was some conveniently low figure.[46]

[46] If the principles which respondent defends are approved, there is room for the extraordinary contention that an agreement setting the "regular rate" must be implied by the court if the parties have not made one for themselves. In *Conti-*

Since the only acknowledged limitation on the power to set "agreed" rates is the minimum wage prescribed by Section 6, there would under respondent's interpretation be a tendency to adopt that minimum as the "agreed rate."[39] At an

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nental Baking Co. v. *Bumpus*, No. 943, this Term, pending on petition for certiorari, an employment contract entered into prior to the Act provided for a salary of $25 per week of 48 hours. Although no modification of the contract was ever attempted, the petitioner maintains that since the "contract must be construed so as to sustain its legality," it was automatically adjusted when the Act became effective by allocating a portion of the weekly compensation to the hours within the statutory maximum and the remainder of the compensation to the excess hours at a rate one and one-half times the presumed rate for hours up to the maximum. When the statutory maximum was reduced from 44 to 42 hours at the end of the first year of the Act's operation, a further automatic adjustment assertedly occurred, with the result that the rate for "straight time" diminished but the required proportion between it and the overtime rate remained constant. Compare *Fleming* v. *Stone*, 41 F. Supp. 1000 (N. D. Ill), where prior to the Act the employees received fixed weekly salaries for fluctuating workweeks. The court, relying upon the decision below in the present case, inferred an agreement setting the "regular rate" sufficiently low so that the total compensation included "time and a half" for overtime hours. Since the workweek fluctuated, the inference necessarily included an automatic weekly adjustment of the "agreed" regular rate.

[39] In at least three cases the minimum wage has been set as the "agreed rate." *McLendon* v. *Bewley Mills*, 4 Wage Hour Rept. 30 (N. D. Tex. 1940); *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.); *Tidewater Optical Co.* v. *Wittkamp*, pending decision, No. 2506, Supreme Court of Appeals of Virginia at Richmond. In the *Atlantic* case the court first held the agreed minimum rates to be an "arbitrary allocation" of part of the salary and not the "regular

"agreed rate" of 30 cents an hour, the present minimum, a $30 a week employee, under the present statutory maximum week of 40 hours, could work as long as 80 hours a week without receiving any additional compensation. To permit private arrangement thus to fix the scope of Section 7 would allow any who chose to make sport of the statute.

CONCLUSION

The decision below should be reversed, and the cause remanded with directions to issue an injunction as prayed in the complaint.

Respectfully submitted.

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rates" (40 F. Supp. at 664). On motion for rehearing the court, under the compulsion of the decision below, held the agreed minimum rates to be the regular rates.

APPENDIX A

Fair Labor Standards Act, 52 Stat. 1060 (29 U. S. C., sec. 201 *et seq.*).

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

* * * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugarbeet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

* * * * * *

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, * * *. Except as provided in section 12, the Administrator shall bring all ac-

tions under section 17 to restrain violations of this Act.

* * * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

* * * * * *

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); * * *.

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

* * * * * *

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment

of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * * *

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

* * * * * *

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relat-

ing to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

APPENDIX B

1. State statutes and regulations referring to a multiple of the "regular" or "normal" rate as a way of expressing the familiar "time and a half" concept:

Colo. Laws 1937, c. 113, sec. 4 (a) (c) ("one and one-third times the normal rate"); Order No. 2, for Retail Trade Occupations ("one and one-half times the regular hourly rate"); Nev. Laws 1937, c. 207, sec. 2 ("time and one-half for each said additional hour, computed on their regular wage rates"); N. Car. Code Ann. (1939), sec. 6564 (3) ("one and one-half times the usual compensation for all hours worked over 55"); Okla. Stats. (1931), sec. 10,848 ("double their regular compensation for such excess time"); Ore. Comp. L. Ann. (1940), sec. 102–502 ("time and one-half the regular wage"); Orders State Welfare Comm. ("time and one-half her regular rate of pay" or "the regular rate"); Pennsylvania Rules and Regulations of Department of Labor and Industry, as approved by the Industrial Board with respect to the Women's 44 Hour Week Law, Pa. Stat. (Purdon 1936), tit. 43, sec. 103, (all overtime "shall be paid for at the rate of one and one-half times the regular rate per hour"; "at a rate of at least one and one-half times the regular wage scale for such periods of overtime"); S. Car. Acts 1937,

No. 326, sec. 1, as amended Acts 1939, No. 204, (Sunday work, "on the basis of one and one-half the amount of the usual average day wage or salary earned by such employee during other days of the week"; Acts 1938, No. 943, sec. 2 (c), ("the said employer shall pay the employee for all overtime at the rate of one and one-half the regular wages"); Tex. Stat. (Vernon 1936), art. 5169, 5170, ("double her regular rate of pay for such time as she is employed for more than nine hours per day"); Washington, Rev. Stat. (Remington 1932), sec. 7643, ("one and one-half times the rate of pay allowed for the same amount of time during eight hours' service"); Wis. Stat. (1939), sec. 103.02, ("one and one-half times the regular rates"); Calif. Labor Code (1937), sec. 1182 (b), Order No. 3A of Industrial Welfare Comm. ("one and one-quarter times the time or piece rates paid during regular time"); Order No. 9 ("time and one-half the rate paid in regular time"); Order No. 11A (for night work "rate and one-half of the day rates"). The fact that specification of the basis of computation adds nothing to the familiar "time and a half" is illustrated by Ore. Comp. L. Ann. (1940), sec. 102–323 ("time and a half for time over ten hours a day when employed in canneries or driers or packing plants * * * piece workers shall be paid one and a half the regular prices for all work done during the time they are employed over ten hours per day").

2. State statutes illustrating that "time and a half" has a sufficiently familiar meaning to be un-

derstood without specification of the basis of computation:

> Ariz. Code Ann. (1939), sec. 56–161 (a) ("time and one-half for all time in excess of eight hours"); Ark. Stat. (Crawf. & M. Dig. 1921, sec. 7109 ("at the rate of time and one-half for each hour worked in excess of 9 hours"); N. Mex. Stat. (Supp. 1938), sec. 80–207 as amended, Laws 1939, c. 196, sec. 7; sec. 80–502, 80–504 ("labor in excess of 48 hours * * * shall be paid for on the basis of time and one-half for such excess"); Ore. Laws 1937, c. 360 ("double pay for the overtime so employed"); Wyo. Rev. Stat. (1931) sec. 63–113 ("time and a half for each and every hour of overtime in any one day").

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